Third World Legal Studies

Volume 6 *The Application of Law and Development Theory: Some Case Studies*

Article 10

1-10-1987

# Some Major Provisions in Modern Investment Protection Agreements

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# SOME MAJOR PROVISIONS IN MODERN INVESTMENT PROTECTION AGREEMENTS*

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## BACKGROUND

Over the last three decades various countries have developed a network of intergovernment agreements designed to promote and protect foreign investments. In 1968, as a response to the increasing international enthusiasm for such agreements, the Organization for Economic Cooperation and Development (OECD) produced the model Convention on the Protection of Foreign Property and this model has been employed as the basis for numerous bilateral investment protection agreements (IPA).[1] The International Chamber of Commerce similarly adopted its Guidelines for International Investments in 1972.[2] The United States traditionally relied on Friendship Commerce and Navigation Treaties for the protection of American persons and property abroad. However, recognising the efficiency of specialised agreements for the protection of investments, it developed the Prototype Treaty concerning the Reciprocal Encouragement and Protection of Investments in 1983 (United States Prototype).[3] Since

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* The original version of this paper was presented to the CONFERENCE ON INTERNATIONAL ECONOMIC LAW, Peking University, Beijing, People's Republic of China, June 17, 18 and 19, 1987.

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1. *OECD Publication*, No. 23081, reprinted in 7 INT'L LEGAL MATERIALS 117 (1968); [hereinafter referred to as OECD Model].

2. *See* Horn, *International Rules for Multinational Enterprise: The ICC, OECD, and ILO Initiatives*, 30 AM. U.L. REV. 923 (1981).

3. Office of the United States Trade Representative, Reagan Administration Initiates Bilateral Investment Treaty Negotiations, 1 Jan. 1982 (press release). Under the "Bilateral Investment Treaty Program" negotiations have commenced on the basis of the Prototype with Bangladesh, Costa Rica, Liberia, Ivory Coast, Sri Lanka, Honduras and China. Forty other countries have also been approached.

then, the United States has employed this prototype in concluding agreements with Panama and Egypt for the promotion and protection of investments. The European Economic Community (EEC) and African, Caribbean and Pacific (ACP) countries are examining the possibility of concluding project-specific IPAs in the minerals sector in the context of the second Lome Convention. The European-Arab dialogue on a multilateral investment convention has reached an advanced stage.

By 1984, OECD countries alone had concluded over 180 investment protection agreements with other countries.[4] West Germany accounted for over 60 of these. The trend in the past has been for IPAs to be relied upon by developed countries to protect the investments of their nationals in developing countries. A recent feature has been the conclusion of such agreements between Less Developed Countries (LDC) (e.g. Egypt and Sudan, Kuwait and Iraq), Newly Industrializing Countries (e.g. Singapore), Socialist countries (e.g. Romania) and even developed countries themselves (Italy and Canada).[5]

China has concluded a number of IPAs[6] with its major trading partners because foreign investments are to play a vital role in its modernisation plans and the importance of ensuring a secure investment climate for foreign investors is recognised by China's planners. Accordingly, in addition to rapidly developing its domestic legal framework as it affects foreign investments, it has proceeded on a programme of concluding IPAs with a number of countries which are significant in an economic sense. China, mainly in order to secure supplies for its expanding industrial sector, has also made investments in a number of other countries and is presently examining the possibility of further investments abroad, including in Australia. Thus, IPAs are important for China from the point of view of protecting its investments in other countries as well.

## Modern Investment Protection Agreements

IPAs concluded in recent years contain a number of common provisions which are designed to provide specific protection to foreign investments in host countries. Some IPAs are more specific than others in the

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4. *See* Appendix A.

5. International Chamber of Commerce, Bilateral Investment Treaties for International Investment 5 (1977) [hereinafter cited as Bilateral Investment].

6. China has already concluded sixteen IPAs, with its trading partners including the U.K., the Netherlands, FRG, France and Sweden. It is in the process of negotiating IPAs with a number of other countries including the USA, Japan and New Zealand.

treatment of their subject matter, while some others, particularly due to the need to balance the often competing interests of the states-parties to them, tend to be less specific and incorporate general principles and intentions of good will.

Many principles incorporated in modern IPAs are drawn from the rules of customary international law relating to the protection of foreign-owned property. These international law principles are useful both to draftsmen of IPAs and to legal advisors who assist in their implementation. The interpretation of such provisions in IPAs would require reliance to be placed on the rules of customary international law and state practice. There are times when the principles drawn from the general rules of international law are adapted to suit the needs of a particular bilateral relationship—making interpretation and implementation a more difficult task. One effect of the practice of drawing on the principles of international law in drafting IPAs is that the relevant principles themselves are being subjected to further development in the process.

The principal objective of this paper is to discuss some of the major principles incorporated in modern IPAs.

## Definitions Used in IPAs

Articles containing definitions in modern IPAs are carefully drafted. The definitions that are used may determine the scope of an IPA. Thus, depending on whether the parties wish their agreement to be more comprehensive or less comprehensive, and depending on the manner in which they wish to regulate their bilateral legal relationship relating to investments from each other in their respective territories, terms such as investment, company, national, and so forth are defined expansively or narrowly or even vaguely.

### *Investments*

The general practice is to adopt a very broad definition of the term "investment."[7] The OECD model defines the term "property" (and not "investments") as "all property, rights and interests, whether held directly or indirectly, including the interest which a member of a company is deemed to have in the property of a company." The France-People's Republic of China (PRC) IPA states that "[t]he term investment means every kind of goods, rights and interests of whatever nature, in particular

7. *E.g.*, by Switzerland, Belgium, the Netherlands, France, the United Kingdom and Sweden.

though not limited to the following [different types of property]."[8] The Federal Republic of Germany-People's Republic of China IPA contains the following definition: "The term investment shall comprise every kind of asset admissible under the currently valid legal provisions of a Contracting Party, in particular, but not exclusively. . . ."[9] The United States Prototype states, "Investment means every kind of asset, owned or controlled directly or indirectly, by nationals or companies of one Party, including equity, debt and service and investment contracts, and includes but is not limited to . . . ." It would seem that a broad definition of the term has been preferred by the parties to the above IPAs. The United States Prototype includes the following in the definition:

> (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
> (iii) a claim to money or a claim to performance having economic value and associated with an investment;
> (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets, know-how and goodwill;
> (v) any right conferred by law or contract, including rights to search for or utilise natural resources, and rights to manufacture, use and sell products; and
> (vi) returns which are reinvested.
> Any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.[10]

The IPA between China and the United Kingdom defines investments to mean every kind of asset and goes on to detail various types of assets.[11]

It would appear that a comprehensive effort has been made to encompass all types of assets within the term investment. This approach, while recognising the advantages that accrue through it to all persons who take

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8. *Agreement Between the Government of the Republic of France and the Government of the People's Republic of China on the Encouragement and Reciprocal Protection of Investments*, 30 May 1984 (France-PRC IPA).

9. *See Treaty Between the Federal Republic of Germany and the People's Republic of China on the Promotion and Mutual Protection of Capital Investment*, 20 December 1984 (FRG-PRC IPA).

10. Art. 1, United States Prototype (1985).

11. Art. 1, *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China Concerning the Protection and the Reciprocal Protection of Investments* (UK-PRC IPA), UKTS No. 33 (1986); also see, Art. 1, *Agreement on the Mutual Protection of Investments Between the Government of the Kingdom of Sweden and the Government of the People's Republic of China*, 29 March 1982 (Sweden-PRC IPA).

risks in investing directly or indirectly in other countries, also acknowledges that the meanings attached to various terms which describe types of assets could vary in different legal systems. Therefore, instead of relying purely on the terminology which identifies broad categories of assets in the mature western legal systems, it makes an effort to describe different types of assets in detail.

### *Companies*

The expression "companies" is generally used in a very loose sense in IPAs to encompass a wide range of entities, regardless of the manner in which they were constituted, the nature and extent of their liability or the nature of their ownership. Consequently, even entities which are not considered to be legal entities in the domestic laws of countries have been brought within the definition of the term company, e.g., partnerships. Article 1 of the United States Prototype, which contains the definitions, illustrates this approach.[12] It states that a

> Company of a Party means any corporation, company, association, or other organisation that is duly incorporated, constituted, or otherwise duly organised under the applicable laws and regulations of a Party or a political subdivision thereof, regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability.

### *Exclusions*

The ability of parties to IPAs to exclude, or exercise the discretion to exclude, from the benefits under them, companies (as defined) which do not satisfy a "control or territorial requirement" is recognised in most of the recently concluded agreements. This is due to the perceived need to restrict the benefits conferred by IPAs to companies which are genuinely established in and controlled by the nationals of the parties to these agreements. For example, the United States Prototype grants a discretion to the host Contracting Party to deny the benefits of the rights created by the prototype to any company which is controlled by nationals of a third country or which has no substantial business interest in the territory of the other Contracting Party or which is controlled by the nationals of a country with which normal business relations are not conducted by the

12. Art. 1, United States Prototype (1985).

host Contracting Party.[13] The last element in this formulation could be employed to exclude companies of countries with which the United States has diplomatic or political problems, even if such companies establish themselves in countries with which the United States has concluded IPAs. In the Swiss model the principle of control is the significant element for this purpose. The French model also uses the criterion of direct or indirect control of companies by nationals of one of the Contracting Parties. A similar provision is found in the Japan-Sri Lanka agreement on the protection of investments.[14]

### Right of Entry and Establishment

Most IPAs generally do not confer an absolute right of entry and establishment to foreign investors. The right to enter and establish is generally qualified by being made subject to approval in accordance with the law and policies of the host state. It is recognised that, despite the possible advantages of foreign investments, there is a preemptory need to safeguard the essential interests of the host state in vital areas. The retention of the right to control entry and establishment of investments indicates that certain types of foreign investments are not considered to be of benefit to the host state and would not be permitted. Thus the host state, acting in accordance with its law and policies, may reject investment proposals or impose conditions on their entry. The French have adopted this approach.[15] On the other hand, the United States Prototype, on face value, takes a more liberal approach. It even grants national treatment to entry and establishment. However, the protocol attached to the prototype excludes vast areas of the United States economy from its ambit.[16] The Netherlands-PRC IPA provides that "[e]ach Contracting Party shall, within the framework of its laws and legislation, permit and encourage investments, within its territory, by investors of the other Contracting Party."[17]

A clause of this nature in an IPA to which Australia is a party would ensure that the requirement to notify the Foreign Investments Review Board in terms of the Foreign Takeovers Act 1975 (Aust.) of intended

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13. Art. 1, United States Prototype (1985).
14. Art. 12(2), Japan-Sri Lanka IPA (1982).
15. Art. 2, France-PRC IPA.
16. *See supra*, "Definitions Used in IPAs."
17. Art. 2, *Agreement on Reciprocal Encouragement and Protection of Investments Between the Kingdom of the Netherlands and the People's Republic of China*, 17 June 1985 (Netherlands-PRC IPA).

investments or transfers, would be given effect. In addition there is a whole range of domestic legal requirements in Australia which would be applicable to foreign investments.[18] The Sweden-PRC IPA limits the scope of the expression "investment" to investments made by investors of one Contracting Party which are accepted by the other Contracting Party, subject to its laws and regulations.[19] The UK-PRC IPA provides for each Contracting Party to encourage and create favourable conditions for investments subject to its rights to exercise powers conferred by its laws.[20] The France-Singapore IPA requires investments by the nationals of one party in the territory of the other to be approved in writing by the host government if they are to be covered by the Agreement.

### TREATMENT OF INVESTMENTS

It is common for IPAs to contain provisions incorporating certain general principles of international law on the treatment of foreign investments in a host country. Briefly, the relevant rules of customary international law require a host state to respect and protect the property of nationals of other states situated within its territory. These rules, which have their origins in the colonial era, have been developed over the years to safeguard the interests of capital exporting countries. (Their repeated incorporation in modern IPAs may contribute to their further clarification and wider acceptance.)[21] However, it is possible that recent developments in international law, e.g., the evolving concept of the New International Economic Order, may have had a limiting effect on these rules.[22]

Although individual IPAs may have been tailored to meet the specific needs of particular bilateral relationships, different IPAs have taken a broadly similar approach when incorporating these rules of international law on the treatment of foreign investments. The Unitod States Prototype, in addition to applying them to investments, extends the application of

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18. The more important laws included: Banks (Shareholdings) Act, 1973; Banking Act, 1959; Broadcasting and Television Act, 1974; Companies (Acquisition of Shares) Act, 1980; Foreign Takeovers Act, 1975; Income Tax Assessment Act, 1936; National Companies and Securities Commission Act, 1976; Reserve Bank Act, 1959; Petroloum (Submerged Lands Act), 1967 (deals with the operation and exploitation of offshore petroleum resources); Trade Practices Act, 1974; Onshore Petroleum and Mining exploration is governed by state laws.

19. Arts. 1 and 2, Sweden-PRC IPA.

20. Art. 2(1), UK-PRC IPA.

21. *See* Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT'L L. 249 (1982).

22. *See* Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437 (1981).

these principles to "associated activities" as well. These include the establishment of agencies and branches; organisation, disposition and acquisition of companies; the making and enforcement of contracts; the leasing of real property; the protection of copyrights, patents and trademarks; and the borrowing of funds. The various elements of the relevant rules of international law comprise:

a) *Fair and equitable treatment* - The IPAs concluded by France require that investments be guaranteed "just and equitable treatment."[23] The United States Prototype provides that the "protection and security of the investment shall in no case be less than that required by international law and that the investment be accorded fair and equitable treatment. . . ."[24] A similar provision is found in the OECD model.[25] The UK-PRC IPA provides for the investments of nationals and companies of either Party to be accorded fair and equitable treatment at all times.[26] The generally accepted view is that "fair and equitable treatment" of foreign investments involves treatment in accordance with a standard which is not objectively unfair or inequitable from an international perspective. What is unfair and inequitable in this context would depend on the circumstances of each case, which would include, *inter alia*, the provisions of the relevant IPA and the terms and conditions imposed on entry. The avoidance of arbitrary and discriminatory application of laws and regulations by the host state would also constitute an element of fair and equitable treatment of investments. Usually, the application of a standard of treatment similar to that which is accorded to nationals is adequate for this purpose. However, were the standard applied to nationals to fall short of the international minimum standard, the international standard would be stricter. It is possible that the international minimum standard would be less favourable than the national standard.

b) *Usual Protection and security* - A state is required to provide protection and security to the property of a national of another state in its territory. (The OECD model makes provision for this.)[27] Public authorities in a host state are required to protect foreign investments in the manner in which they would usually protect property of nationals within the state and involves the exercise of due diligence by them in any action

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23. *See* Art. 36 France-PRC IPA.
24. Art. II(2), United States Prototype (1985).
25. Art. 1, OECD Model.
26. Art. 2(1), UK-PRC IPA.
27. Art. 1, OECD Model.

taken in relation to such property. The United States Prototype requires that protection and security provided to investments shall in no case be less than that required by international law.[28] The UK-PRC IPA provides for investments to enjoy constant protection and security in the territory of the host Contracting Party.[29] (This provision is similar to that in the OECD Model.)

c) *Avoidance of unreasonable or discriminatory measures* - Article 1 of the OECD model requires a host state not to impair the management, maintenance, use, enjoyment or disposal of investment property by unreasonable or discriminatory measures. The British, Dutch and Swiss IPAs with Singapore require that each party ensure that the management, operation, maintenance, use, enjoyment and disposal of investments shall not be impaired by "unreasonable or discriminatory measures" or "unjustified and discriminatory" measures."[30] Article 2(2) of the UK-PRC IPA also states that a Party, without prejudice to its laws and regulations, shall not take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment or disposal of investments. (This formulation exempts acts which could be justified in terms of domestic laws and regulations.)

In the above IPAs, the prohibition against unreasonable and discriminatory treatment of foreign investments is restricted to the areas of management, operation, use, maintenance, enjoyment or disposal of the invested property. Therefore, it could be argued that this element is not required to be applied in certain areas, for example, to the entry and establishment of foreign investments. The scope of the term "unreasonable" and discriminatory has been the subject of judicial interpretation. Where a power is not exercised in accordance with standards that are normal in a given legal system, having in view the purpose of that power, that exercise of power could be categorised as unreasonable.[31] Where a power is abused or misused, an unreasonable exercise of that power would occur.[32] It is not possible to presume that an unreasonable use of power

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28. Art. II, United States Prototype (1985).

29. Art. 2(2), UK-PRC IPA.

30. *See* Art. 2(2), *United Kingdom-Singapore Agreement for the Promotion and Protection of Investments*, 1975; Art. 2(1), *Switzerland-Singapore Agreement on the Reciprocal Promotion and Protection of Investments*, 1978.

31. Judge Azevedo, *Advisory Opinion on Conditions of Admission to the United Nations*, 1947-48 I.C.J. 57, 80.

32. *See Polish Upper Silesia Case and Free Zones of Upper Savoy Case*, quoted in Hambro 1, Nos. 100-101, p. 73.

has taken place. Such an allegation should be clearly established.

Discriminatory treatment in this context would appear to be differentiation introduced in the treatment of foreign investments as a result of arbitrary domestic measures that is not justified by any rule of international law or the provisions of a relevant IPA. Such discriminatory measures need not be expressly directed against the property of a foreign investor and could be "de facto discrimination."

"Long honoured in customary practice, judicial decisions and treaty law, this doctrine may now be a matter of *jus cogens*—part of a newly emerged general norm of non-discrimination which seeks to forbid all generic differentiations among people . . . for reasons irrelevant to individual capabilities and contribution . . . ."[33] (However, it has been argued that all general discrimination of aliens is not necessarily unlawful, especially if the discrimination is in the common interest of the larger community, in this case the vast majority of nationals in the host state, and is not incompatible with international minimum standards.)[34] There would also be an obligation not to discriminate as between different foreigners in an arbitrary manner. Australia implements a policy of general non-discrimination towards all foreign investments.[35] One might suggest that a specific act of discrimination aimed at a national of a Party to an IPA containing a provision on non-discrimination by the host state, even if such act is in accordance with the domestic law, would amount to a breach of the relevant IPA.

## MFN Treatment

It is common for Parties to IPAs to incorporate a provision on most favoured nation (MFN) treatment of the investments of each others' nationals in their respective territories. Such a provision is designed to ensure that investments made in each others' territories by nationals of the two Parties would be accorded at least the treatment accorded to the investments of nationals of other countries investing in the territories of

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33. Weston, *The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Some Reflections Upon the Contemporary International Law of State Responsibility for Injuries to Aliens* in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 95 (R. Lillich, ed. 1983).

34. *See* M. McDougal, H. Lasswell & L. Chen, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 756 (1980).

35. UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, NATIONAL LEGISLATION AND REGULATIONS RELATING TO TRANSNATIONAL CORPORATIONS: A TECHNICAL PAPER at 258 *et seq.*, U.N. Doc. ST/CTC/35 (1980) [hereinafter cited as *National Legislation and Regulations*].

the Parties. A provision of this nature would further strengthen the other articles of an IPA on the treatment of investments.

MFN treatment could be limited to specific areas, e.g., in the avoidance of unreasonable and discriminatory treatment. Article 64 of the second Lome Convention between the EEC and the ACP countries permits each EEC member state to seek from the ACP state concerned the same treatment that is granted to any other EEC member with regard to investments. The UK-PRC IPA states that neither Party shall, in its territory, subject investments or returns of nationals or companies of the other Party to treatment less favourable than that it accords to investments or returns of nationals or companies of any third state. It also requires similar MFN treatment to be granted to the management, use, enjoyment and disposal of investments.[36] Exceptions to the provision on MFN treatment in IPAs are usually provided for in cases where a Party is a member of a customs union, common market, free trade association or a regional economic integration agreement. A further exception is made where a Party concluded a double taxation agreement with another country.[37]

### National Treatment

A difficult provision contained in some IPAs relates to "national treatment" of foreign investments. A provision on national treatment requires that foreign investments of the other Party to an IPA be accorded the same treatment as equivalent domestic investments. The United States Prototype contains a provision on national treatment.[38] The Singapore-West Germany Agreement and the Singapore-Netherlands Agreement also provide for the national treatment of foreign investments covered by them.[39] There is no provision on national treatment in the OECD model. This is a reflection of the lack of agreement on the need for such a provision even among OECD countries.

China agreed to the incorporation of a provision on national treatment in its IPA with the United Kingdom as follows:

> In addition to the provisions of paragraphs (1) and (2) of this Article either Contracting Party shall to the extent possible, accord treatment

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36. Art. 3, UK-PRC IPA.

37. *See* Art. 4, UK-PRC IPA.

38. Art. II, United States Prototype (1985).

39. *See* Art. VII, *Netherlands Singapore Agreement on Economic Cooperation, 1972; Arts. 2, 3 Germany-Singapore Treaty Concerning the Promotion and Reciprocal Protection of Investments*, 1973.

> in accordance with the stipulations of its laws and regulations to the investments of nationals or companies of the other Contracting Party the same as that accorded to its own nationals or companies.[40]

It is noted that the obligation to grant national treatment is qualified by the phrase "to the extent possible" and, furthermore, such treatment is required to be granted only in accordance with its laws and regulations.

It has been argued in the past that a provision on national treatment might not be acceptable to foreign entities investing in China mainly because Chinese enterprises have special obligations towards the State. For example, they are required to make contributions over and above the normal requirement in the event of national emergencies.

In a country like Australia it would be difficult to grant national treatment to all foreign investments due to the existence of certain constraints on such investments. For example, there are constraints relating to entry and establishment as well as disposal of assets. These areas have been subject to separate treatment due to the need to protect the national interest. It is noted that although the United States Prototype of 1983 contained a provision on national treatment, it also contained an annex which excluded vast areas of the United States economy from its scope. The relevant areas were: air transportation; ocean and coastal shipping; banking; insurance; government procurement; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real estate; radio and television broadcasting; telephone and telegraph services; submarine cable services; satellite communications; and use of land and natural resources.[41]

Recent drafts of the United States Prototype exclude foreign investments from a more limited area of the economy. However, it is possible for both parties to an IPA to extend the scope of this exclusion by mutual agreement.[42]

### Entry and Sojourn of Personnel

IPAs could make provision specifically requiring the Parties to permit natural persons of each other who are nationals and personnel employed by their respective companies to enter and remain in each other's territories for purposes connected with investment-related activities. Similarly, provision could be made for the Parties to permit each other's companies to

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40. Art. 3(3), UK-PRC IPA.
41. Art. II(3)(a), United States Prototype (1983).
42. Para. 5 of Protocol, United States Prototype (1985).

engage key personnel, irrespective of citizenship, for purposes associated with investments.[43] A provision of this nature is necessary to ensure that a foreign investor is able to bring in personnel from outside the host country, either because the necessary skills are not available in the country itself or because of the need to ensure that the foreign investor enjoys the freedom to safeguard his investment by placing key personnel of his choice to occupy vital positions in his venture.

Obligations of this nature in IPAs are generally qualified to some extent by being made subject to the laws and policies of the host state relating to the entry and sojourn of non-citizens. This is necessary in order not to cause major difficulties to the implementation of domestic laws and policies relating to the entry and exit of non-citizens. It is common for most countries to have laws regulating the employment of foreigners.

### Access to Courts

Nationals of the Parties to an IPA who make investments are usually permitted full access to the courts and other adjudicatory bodies in the host state to resolve disputes arising from their investment activities. This is designed to ensure that no arbitrary restriction is imposed on the access to courts or such bodies by the host state. Capital exporting countries have found it prudent to make specific provisions on the question of access to domestic tribunals in IPAs concluded with LDCs. Article 4(a) of the United States Prototype provides that "[e]ach Party shall provide nationals and companies of the other Party full access to its courts and other adjudicatory bodies in order to afford a means of asserting claims and enforcing rights." Article 4(b) provides that

> [e]ach Party shall, under its own laws and regulations, permit its nationals and companies to select means of their choice to settle disputes with nationals or companies of the other Party relating to investments and associated activities, including arbitration conducted in a third country, and shall, in accordance with its laws and regulations, provide for the recognition and enforcement of awards resulting from such arbitration.[44]

A provision of this nature, while acknowledging the need to ensure normal access to domestic tribunals to resolve disputes relating to investments also recognises the need to exhaust remedies available domestically,

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43. Art. II, United States Prototype (1985); also *see* Art. 4, France-PRC IPA.
44. Art. 2(4), United States Prototype (1985).

prior to relying on other methods for the resolution of such disputes.

### Nationalisation and Expropriation

It is common for modern IPAs to employ a broad definition of the terms nationalisation and expropriation. They usually include in their meaning not only the taking of property, but also measures curtailing or limiting the activities of investors which are equivalent to nationalisation, i.e., indirect, concealed or creeping nationalisation. The Japan-Egypt IPA states that "[i]nvestments and returns . . . shall not be subject to expropriation, nationalisation, restriction or any other measures, the effects of which would be tantamount to expropriation, nationalisation or restriction."[45] A provision of this nature prevents the taking of any measures, directly or indirectly, to nationalise or expropriate investments of nationals of the other party. Examples of indirect nationalisation and expropriation are "levying of taxes, the compulsory sale of all or part of such an investment or the impairment or deprivation of its management, control or economic value."[46] The UK-PRC IPA provides that "[i]nvestments of nationals or companies of either Contracting Party shall not be expropriated, nationalised or subject to measures having effect equivalent to expropriation or nationalisation . . . ."[47]

The inclination of capital exporting countries would be to impose strict controls on the right of host states relating to expropriation and nationalisation.[48] However, it is recognised in the context of the New International Economic Order and the assertion by states of their sovereign right to control their assets and resources, that such strict controls would be unworkable. Hence provisions are incorporated in IPAs which, while recognising the right of host states to nationalise or expropriate the property of non-nationals, also endeavour to ensure that such nationalisation or expropriation would take place within defined guidelines. The OECD model incorporates these guidelines. These could be summarised as follows:

a) The measures should be for a public purpose and in the public interest. This qualification is intended to prevent any measures of nationalisation or expropriation being taken for a private or capricious purpose.[49]

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45. Art. 5(2), Japan-Egypt IPA; also *see* Art. 4 (and Para. 2, Protocol), FRG-PRC IPA.
46. Art. III, United States Prototype (1985).
47. Art. 5(1), UK-PRC IPA.
48. Weston, *supra* note 33, at 93.
49. For the difficulties associated with establishing public purpose *see* Baade, *Permanent Sovereignty Over National Wealth and Resources*, in Essays on Expropriations 23 (R. Miller & R. Stanger eds. 1967).

The existence of a public purpose and a public interest should be objectively established, and once this is done it is immaterial whether the title to the expropriated or nationalised property passes to the host state or to any other entity. The UK-PRC IPA permits nationalisations or expropriations where they are for a public purpose related to the internal needs of a Contracting Party.[50] Similarly, the France-PRC IPA permits measures of nationalisation or expropriation where such acts are done in the public interest.[51]

b) The measures should be in accordance with law. In stating this requirement the Netherlands-PRC IPA provides for nationalisation or for similar measures to be taken under legal procedure.[52] The Sweden-PRC IPA contains a similar provision.[53] The American concept,[54] which broadly incorporates this principle, is "due process," which is similar to the continental concept of "*Rechtsstaat*," that is, domestic legal procedures that provide due process of law.

Used in an IPA, the content of this concept is not exhausted by reference to the national law of the Parties concerned. The "due process of law" of the Parties is required to correspond to the basic standards set by international law. "Due process of law," as understood in an international legal context, essentially requires that whenever a state nationalises or expropriates foreign-owned property, the measures taken must be free from arbitrariness. Furthermore, safeguards existing in its laws or established judicial precedent must be adhered to and administrative or judicial machinery used or available must correspond at least to the minimum standards required by international law. Accordingly, the term contains both substantive and procedural elements. In this regard it is also important that the amount of compensation fixed should be subject to judicial review. It is possible to specify this requirement in the text of an IPA. For example, the UK-PRC IPA provides that "[t]he national or company affected shall have a right under the law of the Contracting Party making the expropriation, to prompt review by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph."[55] A provision of this nature would not prescribe the form

50. Art. 5(1), UK-PRC IPA.
51. Art. 5(2), France-PRC IPA.
52. Art. 5(1)(a), Netherlands-PRC IPA.
53. Art. 3(1), Sweden-PRC IPA.
54. Art. III(1)(b), United States Prototype (1985).
55. Art. 5(1), UK-PRC IPA.

the judicial review should take, i.e., whether it should be carried out by judicial or administrative courts, as long as the independence of the judge or other adjudicator and the fundamentals of fair hearing are ensured. Those fundamentals include: the right to be heard, if possible, in public; to have advance knowledge of the rules governing the hearing; and to adequate representation.

c) The expropriation or nationalisation should not be discriminatory.[56] The Netherlands-PRC IPA specifically provides that the measures in question should not be discriminatory.[57]

d) The measures should be accompanied by provision for "just" and "effoctive" compensation. This area of the law is full of uncertainties—a state of affairs reflected by the different formulations employed in various IPAs. For example, the Netherlands-PRC IPA requires that "the measures are accompanied by provisions for the payment of compensation;"[58] the UK-PRC IPA simply specifies "reasonable compensation"[59] and the France-PRC IPA requires the payment of "prompt and adequate compensation."[60] The United States has long held on to the concept of "prompt, adequate and effective compensation."[61]

Although capital exporting countries could be expected to support the United States formulation, it would not find much ready support in capital importing countries. Capital importing countries, particularly the less developed ones, have displayed a degree of resistance to the idea of prompt, adequate and effective compensation for nationalised or expropriated foreign property. United Nations and UNCTAD resolutions, which embody the LDC position on compensation, have clearly rejected the United States conception of compensation.[62]

*The Declaration on the Establishment of a New International Economic Order (NIEO)* states that each state is entitled to determine the amount of compensation and mode of payment and any dispute arising

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56. *See supra* p. 9.

57. Art. 5(1)(b), Netherlands-PRC IPA.

58. Art. 5(1)(c), Netherlands-PRC IPA.

59. Art. 5(1), UK-PRC IPA.

60. Art. 5(2), France-PRC IPA.

61. RESTATEMENT (2ND) OF THE FOREIGN RELATIONS OF THE UNITED STATES §§ 185-191 (1965). *See* Schweber, *The Study of the UN's Declaration on Permanent Sovereignty over Natural Rosources*, 49 A.B.A.J. 463 (1963).

62. *See* G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9030 (1973); *Declaration on the Establishment of a New International Economic Order and Programme of Action*, G.A. 4 Res. 3201 & 3202 (S-VI), 29 GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974); UNCTAD Res. 88, 12 U.N. TDOR Supp. (No. 1) at 1, U.N. Doc. ID/B/423 (1973).

therefrom "should be settled in accordance with the national legislation" of the host state.[63] The Declaration of 1974 omits any reference to a duty to compensate in the event of nationalisation or expropriation. Mexico does not conclude IPA's on the basis that it could not agree to the settlement of resource related disputes with non nationals by recourse to third party arbitration.

However, despite the above overt resistance of the LDCs toward admitting an obligation to pay compensation for nationalised foreign proporty, the vast majority of nationalisation-related disputes have in fact been resolved through the payment of some compensation, normally consistent with the valuation standards prevalent since World War II.[64] In actual practice, there has been a broad acknowledgement of a need to provide some compensation in the event of nationalisation or expropriation.[65]

The concept of "just" compensation, equivalent to "fair compensation" or "just price," has been subjected to many interpretations.[66] It is broadly recognised that compensation should represent the "genuine value of the proporty affected" at the moment of deprivation, i.e., the fair market value of the property. This could be specifically provided for in IPA's. The Protocol to the FRG-PRC IPA states, "Compensation within the meaning of Article 4, para. 1 must be in accordance with the value of the expropriated investment immediately prior to the time when the expropriation was publicly announced. The investor and the other Contracting Party shall hold consultations to determine this value."[67] The UK-PRC IPA requires such compensation to amount to "the real value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge and include interest at a normal rate, until the date of payment."[68]

The determination of the "full value" must initially be by a national body unless the value of the property or the method of ascertaining it is stipulated in an agreement between the host government and the investor. To such assessed value should be added interest from the day of the

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63. G.A. Res. 3171, *supra* note 62, at 52 3.

64. *See* Amerasinghe, *The Quantum of Compensation for Nationalized Property* in III THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 98 (R. Lillich ed. 1975).

65. *See* Art. 5(1), U.K.-Singapore Agreement; also, Art. 5(2), France-PRC IPA.

66. *See* WESLEY, A COMPENSATION FRAMEWORK FOR EXPROPRIATED PROPERTY IN DEVELOPING COUNTRIES (1975).

67. Art. 4(c), FRG-PRC IPA.

68. Art. 5(1), UK-PRC IPA.

taking to the day on which compensation is paid. Due to the prevailing uncertainties relating to exchange and interest rates, parties to IPAs tend to take care in drafting provisions on the payment of compensation for nationalised or expropriated foreign property. For example, the UK-PRC IPA provides that "(such compensation) shall include interest at a normal rate until the date of payment, shall be made without undue delay, be effectively realisable and freely transferable."[69]

e) There should be an absence of delay. Compensation must be paid "promptly." For example, the UK-PRC IPA requires that compensation shall be paid without undue delay.[70] This requirement does not affect the necessary procedures which are stipulated by domestic law under which compensation is payable after the measures of deprivation have been effected. What is required is that the measures constituting the taking of the property must be "accompanied" by provision for the prompt payment of compensation—thereby emphasizing the close link, as regards time, between deprivation, the assessment of compensation, and its receipt.

f) Compensation should be effective and transferable (e.g., the requirement in the UK-PRC IPA under which compensation should "be effectively realisable and freely transferable").[71] Compensation is required to be paid in a form which is of practical value to the individual or company entitled to it, having regard to his or its particular situation. It must be "effective" for the company or individual. For example, a foreign company should be able to transfer the compensation that it receives to a currency that is useful to it.

g) Some IPAs make provision for a national of a party who asserts that his investment has been fully or partly nationalised or expropriated to seek prompt review by an administrative or judicial tribunal to determine whether nationalisation or expropriation has in fact taken place, and if so, that any compensation awarded accords with the laws of the host state and the relevant IPA. The UK-PRC IPA provides:

> The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.[72]

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69. Art. 5(1), UK-PRC IPA.
70. *Id.*
71. *Id.*
72. *Id.*

### Losses Suffered due to War, Civil Disturbance, and other Crises

The United States Prototype makes a provision which entitles a national of a party whose investment suffers losses due to a civil disturbance or such other circumstance in the host state to be accorded national, or, if more favourable, MFN treatment, if the host state were to adopt any measures relating to such losses.[73] The FRG-PRC IPA provides as follows:

> Investors of one Contracting Party and joint enterprises with the participation of investors of one Contracting Party who suffer loss of capital investment in the national territory of the other Contracting Party through war, other armed combat, a state of national emergency or other comparable circumstances shall not be discriminated against by this other Contracting Party as regards all measures pertaining to these circumstances.[74]

This could turn out to be a valuable provision in IPAs concluded with less developed countries.

### Transfers

IPAs generally contain provisions to ensure that all funds relating to an investment, income derived from the investment, proceeds of any disinvestment and earnings of personnel are transferable on request. This is one of the major requirements for which an IPA would be designed to cater. The OECD model contains a recommendation to this effect.[75] This particular formulation in the OECD model probably reflects the difficulties that its draftsmen experienced in obtaining agreement on this provision and also an awareness of the sensitivities of developing countries.

Some countries, e.g., Germany, Switzerland and the United States, strongly prefer provisions which ensure total freedom to transfer the above types of funds, while other countries have agreed on certain restrictions on this right, e.g., Sweden and the Netherlands. The rationale for having a provision ensuring the freedom to transfer investment funds appears to be that it is necessary to reassure investors that they could freely transfer out of the host country, funds arising from their investments if the need should arise. The France-Singapore IPA unconditionally guarantees free transfer of returns on investments, installments in repayment of loans,

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73. Art. II, United States Prototype (1985).
74. Art. 4(2), FRG-PRC IPA.
75. Art. 4, OECD Model.

proceeds from assignments, compensation for nationalisation, and "an appropriate share of income earned by nationals of either Contracting Party authorised to work in an approved investment."[76] The Sweden-PPC IPA contains a similar provision.[77] The UK-PRC IPA states that "[e]ach Contracting Party guarantees to nationals or companies of the other Contracting Party the right to transfer freely to the country where they reside, their investments and returns and any payments made pursuant to a loan agreement in connection with any investment."[78] However, this provision is qualified by the other provisions of Article 6. The right to transfer such funds has been made subject to the laws and policies of the host state. This would provide the host state the right to control such transfers in accordance with its domestic laws and policies.

### Resolution of Investment Disputes

It has been found necessary to make provisions in IPAs for the resolution of disputes, both disputes between foreign investors and the host state and disputes between the States Parties. In certain countries, due to the absence of acceptable means for settling investment disputes, foreign investors have faced difficulties in the past. This has contributed to a diminution of confidence of potential investors. Clear provisions for the settlement of disputes relating to investments could add to the improvement of the necessary climate of confidence. This is one of the aspects sought to be enhanced by an IPA.

Generally a clear distinction is drawn between investment disputes and disputes between the parties. The United States Prototype defines investment disputes between the host state and an investor broadly to mean disputes involving the interpretation or application of an investment authorisation granted by the foreign investment authority of a Contracting Party to a national or company of the other Contracting Party or an alleged breach by a Contracting Party of any right conferred or created by the agreement with respect to any investment.[79] The Netherlands-PRC IPA refers to disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party.[80] The UK-PRC IPA makes

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76. Arts. 5(1), 5(2), *Agreement Concerning the Promotion and Protection of Investments*, France-Singapore, 1975.

77. Art. 4, Sweden-PRC IPA.

78. Art. 6, UK-PRC IPA.

79. Art. V, United States Prototype (1985).

80. Art. 9(1), Netherlands-PRC IPA.

provision only for disputes between a national or company of one Contracting Party and the other Contracting Party concerning an amount of compensation—to be settled in accordance with a given procedure.[81] The United States Prototype incorporates a clear procedure for the resolution of investment disputes. As the first step it requires the Contracting Parties to exhaust informal avenues of dispute resolution, e.g., consultations and negotiations. This method is a common form of dispute resolution in East Asia and has the advantage of the parties being able to resolve a dispute amicably, generally to the satisfaction of all the disputants.

With regard to a country like Australia, such a provision would mean consultations and negotiations by the aggrieved foreign investor with the relevant government authority or authorities. If the dispute related to the interpretation or application of a Foreign Investment Review Board (FIRB) authorisation by an investor, the aggrieved foreign investor would be required to consult with the FIRB, in the first instance, in order to resolve the dispute. Such informal procedures are commonly employed by foreign investors in Australia at present to resolve disputes and disagreements with the FIRB. It is one of the functions of the FIRB "to give guidance, where necessary, to foreign investors on those aspects of their proposals that may not be in conformity with Government policy and suggest ways by which the proposals might be amended."[82]

The United States Prototype provides that, failing such consultations and negotiations, the aggrieved foreign investor may resort to the administrative or judicial tribunals available in the host state. The Dutch IPA with Singapore requires the parties to exhaust local remedies first.[83] Although there is a reluctance (at times unjustified) by investors from capital exporting countries to rely exclusively on the tribunals of the host state to resolve investment disputes, it is noted that this is an option made available to disputants in some of the IPAs concluded with China.[84] The Netherlands-PRC IPA provides that where an investment dispute could not be settled amicably within a period of six months from when a disputant sought amicable settlement and the parties have not agreed to any other dispute settlement procedure the investor may choose to do one or both of the following: a) file a complaint with and seek relief from

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81. Art. 7(1), UK-PRC IPA.

82. Summarised from *National Legislation and Regulations, supra* note 35, at 258-292.

83. Art. XI, Netherlands-Singapore Agreement; Art. 9(3), Netherlands-PRC IPA.

84. *See* Art. 10, *Agreement Between the Belgo-Luxembourg Economic Union and the Government of the People's Republic of China Regarding Mutual Investment Encouragement and Protection*, 1984 (Belgo-Luxembourg-PRC IPA).

the competent administrative agency of the host state; and b) file suit with the competent court of law of the host state.[85]

As the next step, the United States Prototype makes provision for investment disputes to be submitted to the International Centre for the Settlement of Investment Disputes (ICSID) established by the Washington Convention of 1965. The ICSID is a readily available avenue to its parties for the resolution of disputes between host states and foreign investors. Disputes may be referred to the Centre for resolution through conciliation and/or arbitration. Sweden and China have made provision for investment disputes to be referred to the ICSID for resolution, subsequent to the conclusion of an additional protocol to their IPA, once China accedes to the Washington Convention.[86] IPAs concluded by the United Kingdom generally make specific provision for the reference of investment disputes to the ICSID for resolution. However, there is no provision to refer investment disputes to the ICSID in the UK-PRC IPA.[87]

Even some IPAs concluded between countries which are not major exporters of capital, e.g., Egypt and Yugoslavia, Sri Lanka and Singapore, provide for the submission of investment disputes to the ICSID. The model IPA developed by the Asian-African Legal Consultative Committee makes the ICSID one of the options available to disputants for the settlement of investment disputes. It is noted in this connection that Australia is currently in the process of completing its domestic consultations for the purpose of acceding to the Washington Convention. None of the IPAs concluded so far by China makes the ICSID available as a mechanism for the settlement of investment disputes. (China is not a party to the Washington Convention at present.)

It is also possible for an IPA to make provision for investment disputes to be resolved by arbitration. The UK-PRC IPA enables the parties to investment disputes to rely on international arbitration. It states that where international arbitration is relied upon, the disputants may agree to one of the following: a) an international arbitrator appointed by the disputants; b) an *ad hoc* arbitral tribunal to be appointed under a special agreement between the disputants; or c) an *ad hoc* arbitral tribunal established under the Rules of the United Nations Commission on International Trade Law (UNCITRAL).[88] If three months have elapsed after

85. Art. 9, Netherlands-PRC IPA.
86. This commitment was stated in a side letter to the IPA.
87. *See* Art. 7, UK-PRC IPA.
88. Art. 7, UK-PRC IPA.

a dispute has been referred to arbitration and no agreement has been reached on the appointment of the arbitrator or the *ad hoc* tribunal, the parties are bound to submit to arbitration under the Rules of UNCITRAL.[89]

### Disputes Between the Parties

There could be disputes between parties to an IPA relating to the interpretation and implementation of the provisions of the IPA itself. Consultations and negotiations are usually relied upon, in the first instance, to resolve such disputes. Failing this, provision is made for resort to be had to more formal means of resolving disputes, for example, arbitration.[90] IPAs concluded by China contain detailed provisions requiring the parties to rely on arbitration for the resolution of such disputes. The FRG-PRC IPA provides that where a difference of opinion between the parties cannot be settled by friendly negotiations within six months, the parties shall submit the matter to an *ad hoc* court of arbitration. [91] This IPA also makes detailed provisions for the establishment of such arbitral tribunals and for the adoption of their own procedures.

### Conclusions

It has been recognised by an increasing number of countries that intergovernmental agreements for the promotion and protection of investments would encourage the flow of investments. Through the political guarantees that they provide they reduce to a considerable extent the political risk attached to foreign investments in a host country and assist in the creation of a climate of confidence for such investments. Such agreements also clarify the legal protection available to foreign investors under the goneral principles of international law. Furthermore, on a bilateral basis, they could be tailored to meet the specific needs of the countries which are parties to them and they could be a subtle means of influencing the approach to international obligations and the domestic legal framework and policies of some countries.

A major purpose behind the conclusion of large numbers of IPAs by members of the OECD has been said to be to encourage the wider acceptance of internationally recognised norms relating to the treatment

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89. *See also* Art. 8, Denmark-PRC IPA.

90. *See* P. Kohona, The Regulation of International Economic Relations Through Law 169 *et seq.* (1985) for discussion on arbitration provisions in international economic agreements.

91. Art. 10, FRG-PRC IPA.

of foreign investments particularly by the less developed countries. The incorporation of international law norms relating to the standard of treatment of investors (for example, non-discrimination, fair and equitable treatment and MFN treatment), transfers, nationalisation, expropriation, compensation and the resolution of disputes is contributing in a significant way to the evolution of the general rules of international law in this particular area.

IPAs concluded so far have been, generally, adhered to by the parties to them. The International Chamber of Commerce has commented:

> That these treaties are respected seems to be evident from a large-scale measure of expropriation from which foreign enterprises protected by relevant treaties appear to have been deliberately excluded. Moreover, in two of the three known cases which might have involved breaches of relevant protective treaties . . . remedial steps were instantly taken by the developing country concerned.[92]

The exceptions to this have been noticeably few. The few breaches of international bilateral obligations relating to foreign investments have largely been the result of domestic upheavals, e.g. in Iran, Chile and Libya. The nature of the relevant political events in those countries was such that the usefulness of the general rules of international law and commitments incorporated in bilateral treaties to deal with their effects on non-nationals was very doubtful anyway. In the final analysis, the mere existence of an IPA would not by itself be adequate to provide an absolute guarantee to foreign investments in a country. However, the existence of an IPA would evidence a favourable investment climate and an acknowledgement of the rules of law applicable to foreign investments in a host country.

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92. *Bilateral Investment, supra* note 5, at 5.

## APPENDIX

*List of Bilateral Investment Protection Agreements concluded between OECD Member countries and developing countries (1984)*

*Bilateral Investment Protection Agreements*

| *OECD Member Country* | *Developing Country* |
|---|---|
| Australia | |
| Austria | Rumania |
| | Bulgaria |
| Belgium | Tunisia |
| Luxembourg | Morocco |
| | Indonesia |
| | Korea |
| | Zaire |
| | Egypt |
| | Rumania |
| | Singapore |
| | Malaysia |
| | Cameroon |
| | Bangladesh |
| Canada | |
| Denmark | Madagascar |
| | Ivory Coast |
| | Malawi |
| | Indonesia |
| | Rumania |
| Finland | Egypt |
| | Bulgaria |
| France | Tunisia |
| | Zaire |
| | Mauritius |
| | Indonesia |
| | Yugoslavia |
| | Egypt |
| | Malaysia |
| | Morocco |

| *OECD Member Country* | *Developing Country* |
|---|---|
| | Singapore |
| | Malta |
| | Rumania |
| | Syria |
| | Korea |
| | Sudan |
| | El Salvador |
| | Paraguay |
| | Sri Lanka |
| | Haiti |
| | Philippines |
| | Liberia |
| | Panama |
| Germany | Pakistan |
| | Malaysia |
| | Togo |
| | Morocco |
| | Liberia |
| | Thailand |
| | Guinea |
| | Cameroon |
| | Madagascar |
| | Sudan |
| | Sri Lanka |
| | Tunisia |
| | Senegal |
| | Korea |
| | Philippines |
| | Chile |
| | Ethiopia |
| | India |
| | Niger |
| | Kenya |
| | Tanzania |
| | Sierra Leone |
| | Colombia |
| | Ecuador |
| | Cent. Afr. Rep. |

| *OECD Member Country* | *Developing Country* |
|---|---|
| | Congo |
| | Iran |
| | Ivory Coast |
| | Uganda |
| | Zambia |
| | Chad |
| | Rwanda |
| | Ghana |
| | Indonesia |
| | Zaire |
| | Gabon |
| | Mauritius |
| | Haiti |
| | Singapore |
| | Yemen (North) |
| | Egypt |
| | Jordan |
| | Malta |
| | Mali |
| | Syria |
| | Oman |
| | Rumania |
| | Papua New Guinea |
| | Bangladesh |
| | Somalia |
| Italy | Guinea |
| | Malta |
| | Gabon |
| | Ivory Coast |
| | Morocco |
| | Tunisia |
| | Niger |
| Japan | Egypt |
| | Sri Lanka |
| Netherlands | Tunisia |
| | Ivory Coast |
| | Cameroon |
| | Indonesia |

| *OECD Member Country* | *Developing Country* |
|---|---|
| | Uganda |
| | Sudan |
| | Kenya |
| | Malaysia |
| | Morocco |
| | Singapore |
| | Thailand |
| | Korea |
| | Yugoslavia |
| | Egypt |
| | Senegal |
| | Sri Lanka |
| New Zealand | Madagascar |
| Norway | Indonesia |
| Sweden | Egypt |
| | Yugoslavia |
| | Malaysia |
| | Pakistan |
| | China |
| | Sri Lanka |
| Switzerland | Tunisia |
| | Niger |
| | Guinea |
| | Ivory Coast |
| | Senegal |
| | Congo |
| | Cameroon |
| | Liberia |
| | Rwanda |
| | Togo |
| | Madagascar |
| | Malta |
| | Tanzania |
| | Costa Rica |
| | Benin |
| | Honduras |
| | Chad |
| | Ecuador |

| *OECD Member Country* | *Developing Country* |
|---|---|
| | Upper Volta |
| | Korea |
| | Uganda |
| | Gabon |
| | Zaire |
| | Cent. Afr. Rep. |
| | Egypt |
| | Indonesia |
| | Sudan |
| | Mauritania |
| | Jordan |
| | Syria |
| | Singapore |
| | Mali |
| | Malaysia |
| | Sri Lanka |
| | Panama |
| United Kingdom | Egypt |
| | Singapore |
| | Korea |
| | Rumania |
| | Indonesia |
| | Thailand |
| | Jordan |
| | Sri Lanka |
| | Senegal |
| | Bangladesh |
| | Philippines |
| | Lesotho |
| | Papua New Guinea |
| | Malaysia |
| | Paraguay |
| | Sierra Leone |
| | Yemen (North) |
| | Belize |
| | Cameroon |

| *OECD Member Country* | *Developing Country* |
|---|---|
| | Costa Rica |
| | St. Lucia |
| | Panama |
| | Haiti |
| | China |
| | Mauritius |
| United States | Egypt |
| | Panama |